Date: August 29, 1997

Case No.: 97-INA-101

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

ANGELICA M. RAMIREZ DeCAMPOS,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 7, 1995, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Angelica Maria Ramirez DeCampos ("Alien") to fill the position of Cook (AF 54-55). The job duties for the position are:

> Cook for authentic Mexican Restaurant. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods. This schedule allows for a thirty minutes meal break. Responsible for ordering inventory. Must speak Spanish as the crew and the owners only speak Spanish and a good percentage of the patrons are native language Spanish speakers as this restaurant is located in a Hispanic neighborhood and this restaurant is authentic.

The requirements for the position are six years of grade school, six years of high school, and two years of experience in the job offered or in a related occupation in a restaurant. Other Special Requirements are, "[m]ust have Dept. Of Health County of San Diego required Foodhandler's card."

The CO issued a Notice of Findings on April 4, 1996 (AF 49-52), proposing to deny certification on the grounds that the Employer has failed to document its actual minimum requirements and to have the Alien properly furnish work history information for the ETA 750B form. Specifically, the Employer's requirement for two years of experience in the job offered does not appear to meet the Employer's true minimum requirements, in violation of 20 C.F.R. § 656.21(b)(5), as all of the Alien's experience has been gained through employment with this Employer; moreover, none of the experience claimed can be verified. Also, the Employer has not provided a statement of the qualifications of the Alien including all jobs held for the past three years, in violation of § 656.21(a)(1).

Accordingly, the Employer was notified that it had until May 9, 1996, to rebut the findings or to cure the defects noted. The Employer requested an extension of time to submit its rebuttal on April 26, 1996 (AF 48), which was granted on May 17, 1996, and gave the Employer until May 19, 1996, to file its rebuttal (AF 57).

In its rebuttal, dated May 11, 1996 (AF 32-47), the Employer contended that the Alien gained her experience working for another restaurant, which was totally unrelated to Alberto's Mexican Restaurants. The Employer further stated that, "... I always have ongoing openings for

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

authentic Mexican menu cooks. If they do not have Mexican menu food preparation experience, then the manager of the restaurant, makes sure that the cook is properly trained in preparing the foods according to our recipes." Additionally, the Employer enclosed an amendment to the ETA 750B form. The Employer also attached to her rebuttal the following: (1) proof of employment at Wine and Cheeses Deli for the Alien from December 1992 until December 1994; (2) copy of bankruptcy action for Goodie's Wine and Cheeses; (3) Alien's statement as per Item #15 on the ETA 750B form; and, (4) letter from the former manager (co-worker) of Goodie's Wine and Cheeses.

The CO issued the Final Determination on July 23, 1996 (AF 28-31), denying certification because the Employer remains in violation of § 656.21(b)(5). The CO determined that the Employer failed to successfully rebut the actual minimum requirement finding.

On July 31, 1996, the Employer requested review of the Denial of Labor Certification (AF 2-27). The CO denied reconsideration on August 22, 1996, and in December 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on December 20, 1996.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its requirement for two years of experience for the job opportunity represents the Employer's actual minimum requirements for the job opportunity (AF 50-51). Specifically, the CO questioned whether the Alien has the requisite two years of experience. Accordingly, the CO instructed the Employer to document that the Alien possesses two years of experience in the job offered.

The Employer's rebuttal submission includes several documents relevant to this issue. First, the Employer submitted what appears to be a pay statement for November 28, 1994, through December 4, 1994 (AF 39). However, the document does not indicate the name of the employer. Therefore, we have no way of knowing whether the Alien was gaining experience in the job offered. Even assuming the Alien was working as a cook, this only shows that she worked for one week, not two years as the Employer is requiring. Next, the Employer submitted a statement from Michael Brooks asserting that he worked with the Alien at Goodies Wine and

Cheese Deli from December 1992 through December 1994 (AF 36). However, as the CO correctly pointed out, the statement does not indicate what position Mr. Brooks held or his relationship to the Alien. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Finally, the Employer submitted a Notice of Motion and Motion to Assume Unexpired Lease and Assign Lease which lists Goodies Wine and Cheese Deli as the Debtor (AF 37-38). We find that this document is not relevant in determining whether the Alien gained two years of experience as a cook while employed at Goodies Wine and Cheese Deli. Based on the foregoing, we find that the Employer has not established that the Alien possesses two years of experience in the job offered. Accordingly, the Employer has violated § 756.21(b)(5) and the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.